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No. 615

Office Supreme Court, U.S.
FILED
DEC 28 1959
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

R. L. BRADFORD,

Petitioner,

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

R. L. Bradford,
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To the Honorable Justices of the Supreme Court of the United States:

R. L. Bradford, petitioner herein, respectfully prays that a writ of certiorari issue to review the final decision of the United States Court of Appeals for the Second Circuit entered on November 4, 1959, rehearing denied November 30, 1959, affirming an order of the United States District Court for the Southern District of New York, denying petitioner's application for a writ of coram nobis.

Opinion Below

The opinion of the Court of Appeals has not been officially reported and will be found appended to the original certified record of the proceedings filed concurrently herewith.

Grounds on Which Jurisdiction is Invoked.

The judgment sought to be reviewed was filed and entered on November 2, 1959, and a petition for a rehearing was filed on November 17, 1959, and it was denied on November 30, 1959. Jurisdiction is conferred on this Court to review said judgment by Title 28, section 1254, United States Code.

Question Presented for Review

The question presented is:

"Does compelling an *accused*, as distinguished from a witness, to testify and give evidence against himself before a grand jury concerning matters charged in an indictment without counsel personally present during such examination constitute a violation of the sixth amendment?

Constitutional Provisions Which the Case Involves

SIXTH AMENDMENT: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

Statement of the Case

On or about October 27, 1949, the grand jury of the Southern District of New York filed an indictment purporting to charge petitioner with the violation of section 1341, Title 18, United States Code.

On November 9, 1949, petitioner, then imprisoned in Federal Detention Headquarters, New York, N. Y., under the purported authority of said complaint and indictment, was forcibly taken against his will by the United States Marshal for the Southern District of New York, before

a grand jury of and in said district and into its grand jury room, and he was then and there directed and compelled by the United States Attorney for said district to testify and give evidence against himself as to matters charged in said complaint and indictment; and that petitioner was, contrary to, and in violation of, law, particularly questioned as to the whereabouts of certain books and records of a certain corporation, to wit, Business Research, Inc. of which said corporation petitioner was not then an officer, director, employee or stockholder; nor did he then have custody, control or possession of its said records (3a).

During said examination, appellant did not have the assistance of counsel personally present to advise him concerning his testimony, and his statutory and constitutional rights appertaining thereto.

Subsequently thereto, and on December 5, 1949, appellant, under the coercion of his court-appointed attorney who had never been admitted to practice law in any federal court, pleaded guilty, though innocent, to said indictment.

On December 12, 1949, appellant was sentenced to one year on two counts, and was given three years probation on the two remaining counts.

A full statement of the facts appears in appellant's Petition (p. 3a).

The stenographer's transcript of the grand jury inquisition is annexed to said Petition (p. 6a).

On or about July 7, 1958, petitioner applied to the United States District Court for a writ of error coram nobis upon the grounds that, as an *accused* and not a witness, he was compelled to testify and give evidence against himself before a grand jury of said district without counsel personally present thereat in violation of the sixth amendment.

On January 20, 1959, said application was denied.

Upon appeal, said order of denial was affirmed by the Court of Appeals for the Second Circuit.

Reasons Relied on for Issuance of the Writ

The sixth amendment to the constitution of the United States prescribes as follows:

> "In all criminal prosecutions, the *accused* shall enjoy the right . . . to have the assistance of counsel for his defense."

Rule 44 of the Federal Rules of Criminal Procedure provides as follows:

> "If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceedings unless he elects to proceed without counsel or is able to obtain counsel."

In *Powell* v. *Alabama*, 287 U. S. 45, 69, the court said that an accused "requires the guiding hand of counsel at every step of the proceedings against him."

Where the accused, as distinguished from a witness, is denied counsel at every stage of the proceedings against him, *the trial court loses jurisdiction*, and all proceedings subsequent thereto, including the judgment, are *void*.

The leading case on loss of jurisdiction where counsel is denied is *Johnson* v. *Zerbst*, 304 U. S. 458, where the court said:

> "He (the accused) requires the guiding hand of counsel at every stage of the proceedings against him. The sixth amendment withholds from federal courts in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." (463)

"The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and *the guaranty would be nullified by a determination that the accused's ignorant failure to claim his rights removes the protection of the constitution.* . . ." (465)

"Since the sixth amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. . . ." (467)

"A court's jurisdiction at the beginning of a trial may be lost 'in the course of the proceedings' due to failure to complete the court—as the sixth amendment requires—by providing counsel for one who has not intelligently waived this constitutional guaranty, and whose life and liberty is at stake. If this requirement of the sixth amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may be released by habeas corpus." (468)

Dragging petitioner, then imprisoned, forcibly before a grand jury, after charge, and compelling him to testify and give evidence against himself so that the prosecution can obtain incriminating admissions; or to ascertain the whereabouts of corporate records which it may not legally do (*Curcio v. United States*, 354 U. S. 118), is a stage in the proceedings against him; and, indeed, a very important stage.

It may seem incredible that such a practice could exist in a country that pretends to a civilized system of jurisprudence, but such are the admitted facts here.

Petitioner, not a *witness*, but an *accused*, was entitled to counsel personally present at that stage of the proceedings where he was examined as to matters charged; and the failure to accord him such right, rendered all subsequent proceedings void under the sixth amendment.

The right to counsel at such time has been firmly established by the Supreme Court in *In re Groban*, 352 U. S. 330, where the court said:

> "The fact that appellants were under a legal duty to speak and that their testimony might provide a basis for criminal charges against them does not mean that they had a constitutional right to the assistance of their counsel. Appellants here are witnesses from whom information was sought as to the cause of the fire. A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel, nor can a witness before other investigatory bodies. There is no more reason to allow the presence of counsel before a Fire Marshal trying in the public interest to determine the cause of fire. Obviously in these situations evidence obtained may possibly lay a witness open to criminal charges. *When such charges are made in a criminal proceeding, he then may demand the presence of his counsel for his defense.* Until then his protection is the privilege against self-incrimination." (p. 332)

Argument Amplifying the Reasons Relied Upon for Allowance of the Writ

This Court in the *Groban* case, *supra*, explicitly held that an *accused*, as distinguished from a *witness*, has the right under the sixth amendment, to the assistance of counsel personally present while being compelled to testify and give evidence against himself before a grand jury, or other inquisitorial body.

It is usually assumed that the lower federal courts are bound to follow the decisions of this Court, particularly as to its declarations of fundamental constitutional rights. In this case, the Court of Appeals completely disregarded the rule set forth by this Court in the *Groban* case.

Furthermore, it gave no reason whatsoever for doing so. It affirmed the order of the district court "on the opinion of Judge Bryan."

Judge Bryan denied the application upon the basis of a decision of Judge Weinfeld reported in 122 F. Supp. 915 (1954).

Judge Weinfeld's decision has no application whatsoever to the present grounds for the reason that the only issue before him was whether compelling petitioner to testify and give evidence against himself violated the *fifth* amendment.

Judge Bryan's quotations from Judge Weinfeld's opinion show that conclusively (24a).

Judge Bryan also quotes Judge Weinfeld's opinion to the effect that petitioner had counsel at every stage of the proceedings (23a). Judge Weinfeld does not say that petitioner had counsel personally present in the grand jury room during the inquisition.

In any event, such statement would be contrary to the indisputable facts of the record for the stenographic transcript shows that such was not the case (p. 6a).

This Judge Bryan admits (25a).

Furthermore, the *Groban* case, upon which petitioner based his instant application to the district court, was not decided until February 24, 1957, so the present grounds could not have been raised before Judge Weinfeld in 1954.

An examination of Judge Bryan's opinion shows that he did not meet the issue squarely, but resorted to obvious irrelevancies.

He based his decision apparently upon prior applications for relief upon other and different grounds that have nothing to do with the present application (25a) (*Chessman* v. *Teets*, 354 U. S. 156); and his only reference to the *Groban* case was that it did not change the law. It was never claimed that *Groban* changed any law. It was claimed that, through it, this Court held that an accused while testifying before a grand jury under compulsion had the right to have the assistance of counsel personally present thereat.

What Judge Bryan held in effect was that Judge Weinfeld's prior decision on another point overruled the *Groban* case subsequently decided; and that, in any event, the district courts could disregard it with impunity.

In this case, the Court of Appeals "has decided a federal question in conflict with applicable decisions of this Court."

It is respectfully submitted that if the lower courts do not follow the mandates of this Court; particularly in regard to fundamental constitutional rights, the administration of justice in the federal courts will fail completely.

There will be one rule for one defendant, and a different rule for another depending solely upon whether a particular court considers itself bound by the *Groban* case, or not.

It is respectfully submitted that this Court granted certiorari to *Groban*, and that the present case, originating in a federal, not a state, court, presents issues of equal importance.

It may be observed that the present trend of both legislation and judicial decisions is to permit presence of counsel during examinations, even where those testifying are not accused, or even suspected, such as Congressional Committee investigations. To deny presence of counsel in such cases is justly regarded with horror as a species of tyranny. How much more important is it that an *accused* have the same right.

Secret inquisitions of an accused can have no legitimate purpose, but are instituted solely for the purpose of extracting evidence to be used later upon a trial. Such practice is unconscionable for the accused sits there alone surrounded by twenty-four grand jurors and one or more prosecutors to be badgered with questions designed to elicit answers that incriminate. It is just as important that the accused have the assistance of counsel in such situations as he admittedly has such right during his trial.

The sixth amendment becomes a dead letter if the lower courts can wilfully deny the right to counsel under such circumstances knowing that, because of the pressure of work, the probabilities of a review by this Court are slight.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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